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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. 403

MISSISSIPPI POWER & LIGHT COMPANY AND
MISSISSIPPI MUNICIPAL ASSOCIATION,
Appellants,

vs.

DELTA ELECTRIC POWER ASSOCIATION,
Appellee.

APPELLEE'S MOTION TO DISMISS APPEAL FROM THE SUPREME COURT OF MISSISSIPPI; AND BRIEF IN SUPPORT THEREOF

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INDEX

I. Motion to Dismiss 1

II. Facts 2

III. Brief and Argument 5

A. Appellant has no rights which are protected by the U. S. Constitution 5

1. Appellant is not protected by the 14th Amendment 5

2. Appellant is not protected by Art. I, Section 10 10

B. Police Power of the State 13

C. Appellant's contention that 7 U.S.C.A. Section 902 prohibits appellee operating in a municipality 14

Table of Authorities

CASES

Cobb v. *City of Malden*, 105 F. Supp. 109 (1952) 8

Delta Electric Power Ass'n v. *Mississippi P. & L. Co.*, 149 So.2d 504 (Miss. 1963) 8

First New York Savings Bank v. *Hahn*, 326 U.S. 229, 90 L. Ed. 34 (1945) 14

Fox River Paper Co. v. *Railroad Comm'n*, 274 U.S. 651, 71 L. Ed. 1279 (1927) 6

Home Building and Loan Ass'n v. *Blaisdell*, 290 U.S. 398, 78 L. Ed. 413 (1934) 13

Lynch v. *United States*, 292 U.S. 571, 78 L. Ed. 1434 (1934) 5

Ochiltree v. *Iowa R.R. Contracting Co.*, 21 Wall. 249, 22 L. Ed. 546 (1875) 10

Pearsall v. *Great Northern R. Co.*, 161 U.S. 646, 16 S. Ct. 705, 40 L. Ed. 838 (1895) 9, 12
Stone v. *Mississippi*, 101 U.S. 814, 25 L. Ed. 1079 13
Veix v. *Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 31, 84 L. Ed. 1061 (1940) 13

STATUTES

Miss. Code 1942, Secs. 5463-5489 15
Miss. Code 1942, Sec. 5474(8) 15
Miss. Code 1942, Sec. 7716-01—"Public Utilities or Public Service Comm'n Act" 2, 5
Miss. Laws of 1936, Ch. 184 15
Miss. Laws 1938, Chs. 251-252 15
7 U.S.C.A., Sec. 902 14

RULES

Rule 16 of the U. S. Supreme Court 1

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I.

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, appellee moves the Court to dismiss this appeal from the Supreme Court of Mississippi on the ground that it does not present a substantial federal question because: (1) there is no federal question other than the constitutional issue raised by appellants and (2) the constitutional issue is not substantial because appellants have no vested rights which are protected by the Con-

stitution of the United States and, further, if appellants did have any vested rights they would be subordinate to the police power of the State of Mississippi exercised herein.

II.

The facts on which this motion is based are:

Appellant Mississippi Municipal Association has no interest in the subject matter of this litigation, and does not claim any rights to be adjudicated herein. We will use the term "appellant" to designate the appellant Mississippi Power & Light Company. All references herein to the record will give the volume number in Roman numerals followed by the page number.

Appellant and appellee are electric utilities. The service area in dispute between them (herein called the disputed area) is a small area that was outside the boundary of any municipality until December 31, 1959, when the municipality of Winona, Mississippi, extended its west corporate limit to include the disputed area.

Appellee had first begun serving the disputed area with electricity in 1940 at a time when there were only two customers in the area and electric service was not then available to it. On March 29, 1956 (the effective date of the Public Utility Act of Mississippi, herein called the Act), and on December 31, 1959, when Winona extended its corporate limits, appellee was rendering excellent electric service to everyone in the disputed area. Neither appellant nor any other electric utility was operating or had ever operated in the disputed area. (IV, 613-25, III, 453-551)

On November 25, 1959, the Public Service Commission of Mississippi, by order rendered in its cause numbered U-117, certificated the disputed area to appellee as its

service area under the provisions of the Act appearing at page A41 of Appendix 4 to Appellant's Jurisdictional Statement herein. Appellant was a party to that cause, did not appeal therefrom, and the order of November 25, 1959, became final. In fact at the time the certificate was issued to appellee the appellant did specifically in writing to the Public Service Commission agree not to interpose any objection to the granting of the certificate to appellee for the disputed area and did further waive any right to appeal from the order granting the certificate to appellee on account of the boundary of the area or the granting of same "or in any way to attack or contend that the Public Service Commission did not have the power or authority to grant the areas" to appellee or to contend that the Commission "should not have done so." (IV, 618-22) Appellee continued to serve every electric customer in the disputed area, and constructed additional lines therein for that purpose. (III, 424-33, 450, 453-551)

Thereafter by ordinance effective December 31, 1959, Winona extended its corporate limits to include the disputed area. Thereafter and in May, 1960, the appellant, without any permission or authority from the Public Service Commission and therefore in violation of the first paragraph of the Act set forth in its Appendix 4, constructed an electric line to a vacant lot in the disputed area. (III, 453-551)

On petition of appellee and after a lengthy hearing the Public Service Commission ordered appellant to take down its duplicating and useless line just mentioned and to cease offering electric service in the disputed area that had been certificated to appellee as its service area. (VI, 1090)

This order was affirmed by the Supreme Court of Mississippi by its opinion appearing as appellant's Appendix 1-A.

Appellant's sole claim to any vested right in the disputed area is based on the following: In 1948 Winona granted appellant a non-exclusive municipal franchise permitting appellant to construct and maintain its electric lines and poles "upon and across all streets, alleys, ways, bridges and public places and other municipal property in said municipality, as they now exist, or may hereafter be laid out or extended," . . . (Appellant's Appendix 6, p. A48); and in the same year appellant contracted with Winona to furnish Winona its "entire street lighting service." (Appellant's Appendix 7, p. A51) At the time that the franchise and street lighting contract were executed and at the time Mississippi enacted its Public Utility Act and at the time that the disputed area was certificated by the State of Mississippi through its Public Service Commission to appellee as its service area, the disputed area was outside the boundaries of Winona and therefore beyond the jurisdiction of Winona; and at those times the appellant did not have a customer or a line or any property of any kind in the disputed area. The appellant's claim is that its non-exclusive franchise from Winona (which had no jurisdiction over the disputed area) gave appellant a vested right in the disputed area of such potency as to forever preclude the State of Mississippi in the exercise of its police power from awarding the disputed area to appellee or any other utility as its service area. The effect of this contention is to say that the State of Mississippi is powerless to grant a utility franchise to any territory in Mississippi that will be good against appellant because Winona might some day acquire jurisdiction of it by expanding its municipal boundaries.

III.

BRIEF AND ARGUMENT

A. Appellant Has No Rights Which Are Protected by the Constitution of the United States.

Appellant urges that the enactment of the Mississippi Public Service Commission Act, Sections 7716-01 *et seq.*, Mississippi Code of 1942, impaired the obligation of its non-exclusive franchise and street lighting contract with the municipality of Winona, and also deprived appellant of property rights in the said contracts; which actions are alleged to be violative of Art. I, Section 10, and the Fourteenth Amendment of the U. S. Constitution. Appellee respectfully submits that there is no merit in either of these contentions for the reason that Art. I, Section 10, and the 14th Amendment protect only *vested* rights, and appellant has no vested rights.

1. Appellant Is Not Protected by the 14th Amendment.

Contractual rights may be "property" within the meaning of the 14th Amendment, and such rights may be within the prohibition of that Amendment; however, this is so only if the contractual rights are vested. Mr. Justice Brandeis in delivering the opinion of the Court in *Lynch* v. *United States*, 292 U.S. 571, 78 L. Ed. 1434 (1934), made the following distinction:

> "Pensions, compensation allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress. (Citing cases) On the other hand War Risk policies, being contracts, are property and create vested rights."

This language does not mean that all contracts are property within the 14th Amendment; but that they are such only if they create vested rights. See 16A C.J.S., Constitutional Law, Section 599(b) and (c), which latter section says:

> "The due process clauses protect vested rights only, and have no reference to mere concessions or privileges which the public authorities may control, and bestow, or withhold, at will, . . . nor do due process clauses apply to supposed property rights which a state court has found to be nonexistent, or which are in fact nonexistent, or to rights or interests which have not become vested and are open to doubt or controversy."

In *Fox River Paper Company* v. *Railroad Commission of Wisconsin*, 274 U.S. 651, 71 L. Ed. 1279 (1927), the Paper Company asserted a right as riparian owner to maintain and make improvements on a dam which it had owned since 1878 without having to comply with a statute of Wisconsin which said that the Paper Company must first receive a permit from the Railroad Commission. The Paper Company contended that the statute of Wisconsin violated the 14th Amendment in that it took its property without compensation, since a condition to the granting of a permit was that the company agree that the State could take over the dam after 30 years upon paying compensation. In upholding the statute, the Supreme Court said:

> "Plaintiff's (Paper Company) case rests on the contention that by the law of Wisconsin the rights vested in riparian owners include the right to use the water power and for that purpose to dam the river, subject only to the exercise by the state of its police power to regulate the use of navigable waters in the public interest, and to protect public health and safety; that to withhold from plaintiffs, as the state does under the statute, the right to use their own property

unless they agree to surrender it to the state at a price which may prove at the time of transfer to be less than its true value, is a taking of property without due process, prohibited by the 14th Amendment.

". . . The point first to be determined is whether the plaintiff's description (of his rights under Wisconsin law) is accurate. . . . (The state court held) The right of the riparian owner to develop water power by the construction of the dam remains inchoate until the state has given its consent.

". . . We are not concerned with the correctness of the rule adopted by the state court, its conformity to authority, or its consistency with related legal doctrine. . . . It is for the state court, in cases such as this, to define rights in land located within the state, and the 14th Amendment, in the absence of an attempt to forestall our review of the constitutional question, affords no protection to supposed rights of property which the state courts determine to be non-existent.

"We accept as conclusive the state court's view of the nature of the rights of riparian owners. . . ."

It is respectfully submitted by the appellee that the Fox River case controls the case at bar. In the case here, the Mississippi Supreme Court found that appellant had no right in the territory outside the municipality of Winona in 1956 (the date of the alleged unconstitutional statute):

"Appellees (appellants here) contend that to deny extension of the corporate franchise and street lighting contract to the disputed area would violate the impairment of contracts and due process clauses of both the State and Federal Constitutions. . . . We find no merit in this position. It is based on the assumption that the franchise and street lighting contract, which were granted company (appellant here) by Winona when the disputed area was not within the corporate limits, vested in Company rights in that area, which

was then outside of municipal limits. When they were executed by the City, no statute of this state authorized Winona to grant a franchise or street lighting contract to the disputed area, then outside the City. Winona's power was confined to its corporate limits. The City had no extraterritorial power of any kind to grant company any rights in the disputed area when the contracts were executed.

"On the effective date of the Public Utility Act, and before the disputed area came within municipal limits, the legislature by that Act vested in Delta (appellee here) a right to receive for it a grandfather certificate. This was a valid exercise of the police power of the State. The municipal franchise and street lighting contract were not pre-existing rights as to the area involved in this suit, because before they could attach, if at all, the certificate issued to Delta (appellee here) by the Commission under the Act attached to the disputed area." 149 So.2d at 513-14.

Thus, it would appear that under state law, as in the Fox River case, the appellant had no rights at all to be protected by the 14th Amendment or the contract clause of the Federal Constitution. However, even if this were not so, it can be demonstrated that whatever rights appellant did have by the franchise and contract were not vested rights. In *Cobb* v. *City of Malden*, 105 F. Supp. 109 (1952), in which school teachers claimed that their salary contracts were violated contrary to the 14th Amendment by an Act of the Massachusetts Legislature, the Court said:

". . . Valid contracts are property and as such cannot be interfered with without due process of law. . . . However, it seems that a given contract must become fixed and binding on the parties before any property rights vest in relation to it. Did the rights of the present plaintiffs to this salary increase under their contracts vest before the alleged illegal action was

taken by defendants in this case? In my opinion they did not. It is true that plaintiffs had valid subsisting contracts at the time of the passage of Chap. 29. But some of the terms of these contracts were subject to revision from time to time, such as the amount of compensation plaintiffs were to receive. Before the salary increases involved here were voted by the School Committee, Chap. 29 had been passed and that ordinance in effect provided that no school teacher should be absolutely entitled to a pay raise voted by the School Committee if it was later nullified by a special vote of the people at large. For all purposes and effects a new term had been inserted in the employment contracts which said that the School Committee no longer had the final say in every case as to how much pay the teacher could receive. Plaintiffs could not be deprived of property to which they had no absolute claim.

"All of the plaintiff's contentions must fall, because it appears factually that they did not have an absolute unconditional property right in the salary increase voted by the School Committee."

In *Pearsall* v. *Great Northern R. Co.*, 161 U.S. 646, 16 S. Ct. 705, 40 L. Ed. 838 (1895), in defining vested contract rights, the Court quoted from Cooley, Constitutional Law, 332, as follows:

". . . rights are vested, in contradistinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. They are expectant when they depend upon the continued existence of the present condition of things until the happening of some event. They are contingent when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting."

Under this definition of "vested", it is impossible to see how appellant had anything other than contingent and expectant rights in the disputed area. Winona might never have expanded its corporate limits; and indeed the State of Mississippi may have taken away the powers of Winona to do so. If this is so, how can it be said that appellant acquired any rights by a contract with the City of Winona, when Winona had no power over the subject matter of the contract? It is admitted that a city may make a contract with reference to its boundaries as they may "now or hereafter exist", but such a contract certainly doesn't give the contractee any vested rights in all the territory outside the city; and for the same reason, it therefore gives no rights in any of the territory outside the corporate limits. At most, then, all the contractee can be said to have is a contingent and expectant right; and as pointed out, such a right is not protected by the 14th Amendment.

2. Appellant Is Not Protected by Art. I, Section 10.

As set forth above the 14th Amendment protects only vested rights, and not those rights which are non-existent under state law or merely contingent and speculative. This same rule applies with equal force to the prohibition of Art. I, Section 10, against impairing the obligations of contracts; but it was thought that a clearer presentation could be made by separating the two points.

In *Ochiltree* v. *Iowa R. R. Contracting Co.*, 21 Wall. 249, 22 L. Ed. 546 (1875), a constitutional provision of Missouri enacted in 1865 made all stockholders of private corporations liable in double the amount of their stock. This constitutional provision was changed in 1870 so that the liability did not extend beyond the amount of subscribed and paid up stock. The defendant in this case had bought stock after 1870 by an original subscription of

stock; but the plaintiff sought to hold him liable doubly since plaintiff's judgment on a debt was obtained before repeal of the constitutional provision. The State Supreme Court held that the Amendment of 1870 relieved stockholders subscribing after 1870 from the effects of the former constitutional provision as to debts contracted prior to the Amendment; and the plaintiff contended in the United States Supreme Court that therefore the Amendment of 1870 impaired the obligations of his contract.

The Supreme Court, in affirming, said:

> "The law of the contract in this case undoubtedly gave the plaintiff the right to subject existing stockholders in the corporation, with whom the debt was contracted, to the double liability provision. . . . What right had he (the plaintiff) to assume that other stock would be taken? It may be that he expected this would be done, and that thereby his security would be increased; but the obligations of a contract within the meaning of the Constitution is a valid, subsisting obligation, not a contingent or speculative one. It was no part of the obligation of contract that future stock should be taken. The value of it would be enhanced if this were done, but the obligation of it would be the same whether the stock were taken or not. . . . But suppose no additional stock were taken, the plaintiff has all that he trusted, and has no right to complain that his contract is not as valuable as he thought it would be."

The same is true of the case on appeal here, viz., it was no part of the obligation of appellant's contract with Winona that Winona expand its limits so as to include the disputed area. It may be that appellant hoped this would be done; but whatever rights appellant acquired by said contract can only be contingent and speculative—and, as in Ochiltree, are not protected by the contracts clause of the federal Constitution.

Again, in *Pearsall* v. *Great Northern R. Co.*, 161 U.S. 646, 16 S. Ct. 705, 40 L. Ed. 838, quoted *supra*, the Court held that contingent or expectant rights in a contract are not protected from subsequent legislation impairing or abridging those contingent rights. In that case, the charter of the Minneapolis and St. Cloud Railroad Company gave the company the right to connect with any railroad running in the same general direction, and, by a subsequent amendatory act, to consolidate its capital stock or its property, road, or franchise with those of any other railroad. Before the company exercised this right, the state legislature passed an act in 1881 inhibiting the consolidation, lease, or purchase by any railroad of the stock, property or franchise of any parallel or competing line. After the passage of this act, the company entered into an agreement with the holders of bonds of the Northern Pacific Railroad Company for the purchase of the property and franchises of the latter company. Pearsall, a stockholder of the Great Northern R.R., brought suit to enjoin enforcement of this agreement under the statute of 1881. Defendant company contended that the Act of 1881, if construed as plaintiff desired, would impair the obligation of his charter contract. The state court dismissed the bill, and plaintiff appealed to the United States Supreme Court. After quoting the language from Cooley hereinabove set out as to the distinction between vested and contingent interests, the Court held that a "bare unexecuted power to consolidate with other corporations, a power which, if it exists as claimed by the defendants, would authorize it to absorb by successive and gradual accretions the entire railway system of the country, is . . ., so long as it remains unexecuted, within the control of and subject to revaluation by the legislature. . . ."

Likewise, in the case at bar, all the appellant had was a bare unexecuted power (really, less than that since it

was also contingent on another event) in 1956 when the Public Service Commission Act was enacted. It should be noted, however, that in the Pearsall case it is difficult to ascertain whether the court is holding an unexecuted right to be a contingent right; or whether it is saying that the police power of the state more easily outweighs an unexecuted right ("But we think it was competent for the legislature, out of regard for the public welfare, to declare that its charter should not be used for the purpose of stifling competition and building up monopolies. In short, we cannot recognize a vested right to do a manifest wrong.") It is probable that the court relied on both reasons, which suggests another and equally cogent ground for sustaining appellee's motion.

B. Police Power of the State.

It is well established that the police power of the state cannot be contracted away. *Stone* v. *Mississippi*, 101 U.S. 814, 25 L. Ed. 1079; *Home Building and Loan Association* v. *Blaisdell*, 290 U.S. 398, 78 L. Ed. 413 (1934), and a multitude of cases cited therein. In *Veix* v. *Sixth Ward Bldg. and Loan Assoc.*, 310 U.S. 31, 84 L. Ed. 1061 (1940), in affirming the dismissal of a suit against a building and loan association for the withdrawal value of shares on the ground that a subsequent statute restricting the right of withdrawal was a valid exercise of police power even though such statute might impair the obligations of contract, the court said:

> "In Home Bldg. & Loan Asso. v. Blaisdell this Court considered the authority retained by the state over contracts 'to safeguard the vital interests of its people.' The rule that all controls are made subject to this paramount authority was there reiterated. Such authority is not limited to health, morals and safety. It extends to economic needs as well."

And, finally, in *First New York Savings Bank* v. *Hahn*, 326 U.S. 229, 90 L. Ed. 34 (1945), the Supreme Court of the United States per Mr. Justice Frankfurter, used this language:

> "The Blaisdell case and decisions rendered since . . . yield this governing constitutional principle: when a widely diffused public interest has become enmeshed in a network of multitudinous private arrangements, the authority of the state to safeguard the vital interests of its people . . . is not to be gainsaid by abstracting one such arrangement from its public context and treating it as though it were an isolated private contract constitutionally immune from impairment. . . . A more candid statement is to recognize, as was said in Manigault v. Springs, *supra*, that the power 'which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the . . . general welfare of the people, and is paramount to any rights under contracts between individuals.' . . . Once we are in this domain of the reserve power of a state we must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary.'"

C. Appellants' Contention That 7 U.S.C.A. 902 Prohibits Appellee Operating in a Municipality.

At pages 32 to 39 of their Jurisdictional Statement the appellants argue that under federal statutes the Administrator of REA was only authorized to make loans to appellee to construct lines in rural areas; that in some unstated way this limitation by the federal government on the right of its officer to make loans superseded the rights conferred on this appellee by its creator, the State of Mississippi, and became a limitation on the right of appellee to sell electricity in the disputed area after it was taken into a municipality.

The loan limitation in the federal statutes cited by appellants is a limitation on the Administrator of REA and not on this appellee; and, further, even as to the Administrator the limitation applies only as of the time that he made the loan. Even as to the Administrator a valid loan made by him and used to construct lines in a rural area does not become invalid years later because a Mississippi municipality expands its corporate limits to take in these lines.

Appellee is a Mississippi corporation and its right to operate is conferred and limited by Mississippi statutes. As stated by the Supreme Court of Mississippi in its opinion in the case at bar:

> "Delta (appellee here) is a Mississippi corporation organized and operating under the Electric Power Association Act of 1936. Miss. Laws 1936, Ch. 184; Miss. Laws 1938, Chs. 251-252; Miss. Code 1942, REc., Secs. 5463-5489. It is vested with authority to operate electric services both within and without municipalities. Code Sec. 5474(8)." (Appellant's Jurisdictional Statement Appendix 1-A p. A2)

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, T. Harvey Hedgepeth, one of the attorneys of record for Delta Electric Power Association, appellee in the above styled cause, and a member of the bar of the Supreme Court of the United States, hereby certify that I have this day served the foregoing motion to dismiss upon appellants and other interested persons in the following manner: By depositing copies thereof in sealed envelopes in the United States Post Office at Jackson, Mississippi, with first class postage prepaid, properly addressed, to each of the attorneys of record for appellant, Mississippi Power & Light Company, to-wit: Sherwood W. Wise, Electric Building, Jackson, Mississippi; Fred B. Smith, Ripley, Mississippi; Garner W. Green, Electric Building, Jackson, Mississippi; and Joshua Green, Electric Building, Jackson, Mississippi; and to Charles C. Jacobs, Jr., Commerce Building, Cleveland, Mississippi, attorney of record for Mississippi Municipal Association; and to E. W. Stennett, Barnett Building, Jackson Mississippi, attorney of record for City of Clinton, Mississippi; and to the following who were *Amici Curiae* in the Supreme Court of Mississippi: R. B. Deen, Jr., Dixie Towers, Meridian, Mississippi, attorney for East Mississippi Electric Power Association; Everette Truly, City Bank Building, Natchez, Mississippi, attorney for Southwest Mississippi Electric Power Association; A. A. Cohn, Panzica Building, Brookhaven, Mississippi, attorney of Magnolia Electric Power Association (and in view of his known death, to Henry Ware Hobbs, Jr., Panzica Building, Brookhaven, Mississippi, present attorney for Magnolia Electric Power Association); O. F. and J. O. Moss, Lucedale, Mississippi, attorneys for Singing River Electric Power Association; D. H. Waits, North Broad Street, Leland, Mississippi, attorney for Twin County

Electric Power Association; John K. Keyes, Collins, Mississippi, attorney for Southern Pine Electric Power Association; David C. Welch, The Gardiner Center Offices, Laurel, Mississippi, attorney for Dixie Electric Power Association; J. P. Stone, Coffeeville, Mississippi, attorney for Tallahatchie Valley Electric Power Association; Leon Porter, Clarksdale, Mississippi, attorney for Coahoma Electric Power Association; Michael D. Haas, 128 Court Street, Bay St. Louis, Mississippi, attorney for Coast Electric Power Association; Ernest R. Duff, Newsom Building, Columbia, Mississippi, attorney for Pearl River Valley Electric Power Association; Thomas H. Watkins, Plaza Building, Jackson, Mississippi, attorney for Mississippi Power Company; and James S. Eaton, 2300 14th Street, Gulfport, Mississippi, attorney for Mississippi Power Company.

This September ..... , 1963.

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T. HARVEY HEDGEPETH.